SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1541

THE SUSQUEHANNA CORPORATION, *Petitioner,*

v.

MARY M. DASHO, Executrix for the Estate of WILLIAM A. DASHO, Deceased, DASHO-ROGERS, INC., and MAURICE H. SCHY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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May 25, 1972.

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The Susquehanna Corporation hereby petitions this Court to grant certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 18, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, entered on January 18, 1972, has not yet been reported. It is reprinted in Appendix A hereto, pp. 1a-38a, *infra.*

The memorandum opinion, findings of fact and conclusions of law of the United States District Court for the Northern District of Illinois, Eastern Division (Marovitz, J.), dated February 6, 1970, are not reported. They are reprinted in Appendix B hereto, pp. 41a-84a, *infra.*

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 18, 1972. See Appendix A hereto, p. 39a, *infra.* On February 25, 1972, timely petitions for rehearing filed by the various defendants, including an *en banc* rehearing request by the petitioner Susquehanna Corporation, were denied by the Court of Appeals. See Appendix A hereto, p. 40a, *infra.* This petition for writ of certiorari has been filed within 90 days from the entry of the order denying rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the constitutional right to a jury trial of legal issues involved in a stockholders' derivative action, as recognized in *Ross* v. *Bernhard,* 396 U.S. 531 (1970), must be retroactively enforced so as to require the retrial before a jury of a complicated derivative action that was tried before the *Ross* decision by a federal judge sitting without a jury and has been fully and competently resolved by him, particularly where no demand for a jury trial was made until 38 months after institution of suit.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This derivative action, instituted by stockholders of the Susquehanna Corporation, began in October of 1965 with the filing of a complaint in the District Court for the Northern District of Illinois. The complaint contained no request or demand for trial by jury of the numerous and complex issues therein raised.

The complaining stockholders, respondents herein, sought in that complaint to prevent the consummation of a planned merger of the Susquehanna Corporation and the American Gypsum Company. They also sought to recover damages for Susquehanna and its pre-merger stockholders for certain allegedly fraudulent and conspiratorial transactions engaged in by Susquehanna's directors. The District Court refused to enjoin the consummation of the merger, which then took place in December of 1965.

At about the time of the consummation, the complaining stockholders filed an amendment to the complaint, adding what came to be known as Count II. Again, no request for a jury trial was made. The original complaint, now known as Count I, had asserted various claims under § 17(a) of the Securities Act of 1933 and § 10(b) of the Securities Exchange Act of

1934. The basic thrust of Count I was the charge that Susquehanna had been harmed by the merger and by an earlier purchase of 222,107 of its own shares at an excessive price. The new Count II asserted that the pre-merger proxy solicitation violated § 14(a) of the Securities Exchange Act of 1934.

The various defendants, including Susquehanna, moved to dismiss both counts for failure to state causes of action. Although there was no ruling as to the sufficiency of Count II, the District Court in June of 1966 sustained the motion to dismiss as to Count I. *Dasho* v. *Susquehanna Corporation,* 267 F. Supp. 508 (N.D. Ill. 1966). Proceedings under Count II were then held in abeyance pending an appeal from that dismissal. In June of 1967 the Seventh Circuit reversed the order dismissing Count I and remanded the cause to the District Court for further proceedings, holding that the allegations in that count were sufficient to state a claim under § 17(a) of the 1933 Act and § 10(b) of the 1934 Act. *Dasho* v. *Susquehanna Corporation,* 380 F. 2d 262 (C.A. 7, 1967). This Court denied certiorari, sub nom. *Bard* v. *Dasho,* 389 U.S. 977 (1967).

Following the remand to the District Court, the various defendants filed their answers to both counts in February and March of 1968, making no request for a jury trial. The complaining stockholders promptly moved to strike several portions of these answers, including parts of all five affirmative defenses that three of the various defendants had asserted. Those three defendants were Susquehanna, American Gypsum and Herbert F. Korholz. The motions to strike raised substantial questions that were briefed at length. Thereafter, on October 21, 1968, the District

Court struck portions of the affirmative defenses and granted leave to the complaining stockholders to file a reply to the surviving affirmative defenses of the three defendants by December 1, 1968. The reply was not actually filed until December 30, 1968, but no objection to its late filing was made at that time.

The first and the only demand for a jury trial was endorsed on this late reply filed by the complaining stockholders on December 30, 1968—some 38 months after the filing of the original complaint. Although this reply was no more than a denial of allegations already put in issue, the Seventh Circuit has now ruled that, for purposes of Rule 38(b), Fed. Rules Civil Proc., this late reply constituted the "last pleading" directed to an issue triable of right by a jury; hence the jury trial demand, having been made "not later than 10 days after the service of the last pleading directed to such issue" as Rule 38(b) requires, has been deemed timely. See Appendix A hereto, pp. 16a-17a, *infra*. In the Seventh Circuit's words (p. 17a, *infra*):

> "If the reply had been filed on December 1, 1968, quite clearly it would have been the 'last pleading' within the meaning of Rule 38(b). Up to that time there had been no final definition of the issues and no waiver of the right to a jury trial. By permitting the reply to be filed on December 30, 1968, the trial court effectively extended the time for filing the 'last pleading,' and thus the time in which to demand a jury.
>
> "When the district court sustained the motion to strike the jury demand, he placed no reliance on its late filing. . . ."

The defendants moved to strike this belated jury demand. On February 28, 1969, the District Court

granted the motion and struck the stockholders' demand for a jury trial. In so ruling, as the Seventh Circuit has noted, the trial judge "made it perfectly clear that his ruling was based on the Second Circuit decision in *Ross* v. *Bernhard* [403 F. 2d 909 (C.A. 2, 1968)], and he indicated at the hearing on the motion that if the law permitted a jury trial in a derivative action, he would not have rejected the demand as untimely."[1] Appendix A hereto, p. 17a, *infra*. The pertinent portion of the District Court's memorandum opinion striking the jury demand follows:

> "Plaintiffs' jury demand was made under Rule 38, Fed. R. Civ. P. . . . Defendants have raised some objections to the lack of timeliness of plaintiffs' jury demand, but such objections are not crucial because plaintiffs have no right to a jury trial. Federal Rule 38(a) preserves the right to a jury trial only as that right is declared by the Seventh Amendment, which in turn, limits the right to certain suits recognized at common law and involving a disputed value of over twenty dollars. Though procedural reforms have modified the historical distinctions between suits at law and those in equity, *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 503-11 (1959), *Metzger* v. *New York Tatham-Laird & Kudner, Inc.*, No. 66 C 1541, (N.D. Ill. January 10, 1969), the distinc-

[1] At the time of the striking of the jury trial demand in this case, a petition for certiorari was pending before this Court to review the Second Circuit ruling in *Ross* v. *Bernhard*. Certiorari was granted on March 24, 1969 (394 U.S. 917), and the Second Circuit's decision was reversed on February 2, 1970. *Ross* v. *Bernhard*, 396 U.S. 531 (1970). The Second Circuit in *Ross* had held that a derivative action was entirely equitable in nature and that no jury was available to try any part of it. Certiorari was granted because the Second Circuit's ruling was in direct conflict with the Ninth Circuit's ruling in *DePinto* v. *Provident Security Life Ins. Co.*, 323 F.2d 826 (C.A. 9, 1963). See 396 U.S. at 532.

tion still remains a viable one. *Kennedy* v. *Rubin*, 254 F. Supp. 190 (N.D. Ill. 1966). As stockholder derivative action was originally recognized in equity and its equitable nature has never been seriously disputed,

> 'the right to a jury trial guaranteed by the Seventh Amendment to the United States Constitution does not extend to stockholders' derivative actions.' *Ross* v. *Bernhard*, 403 F. 2d 909, 910 (2d Cir. 1968), petition for cert. filed, 37 U.S.L. Week 3285 (Jan. 29, 1969).

Contra, DePinto v. *Provident Security Life Ins. Co.*, 323 F. 2d 826 (9th Cir. 1963), cert. denied, 376 U.S. 950 (1964). The motion to strike plaintiffs' jury demand is granted."

In the meantime, the extensive pre-trial proceedings continued apace in the District Court. Further discovery, which in sum covered a period of nearly four years, was had. The complaint was further amended and refined. And then finally, in September of 1969, the non-jury trial commenced before Judge Marovitz of the District Court.[2] The trial lasted approximately five weeks, during which 22 witnesses were examined, three depositions were read into the record, 242 exhibits were admitted (14 additional documents were excluded), and nearly 2,700 pages of transcript were compiled. At the end of the trial the complaining stockholders filed an amended complaint to conform their final theories of the case to the proof adduced at the trial; and in that complaint they abandoned all the conspiracy charges that had been a part of Count I of the original complaint.

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[2] At the start of the trial, on motion of the complaining stockholders, three of the defendants (Bard, Wirtz and Mason) were dismissed from the case.

Subsequently, on February 6, 1970, the District Court entered comprehensive findings of fact and conclusions of law, resulting in a judgment in favor of the defendants and against the complaining stockholders on all claims.[3] The case was ordered dismissed. See the 43 pages of Appendix B hereto, pp. 41a-84a, *infra,* that are necessary to reproduce the carefully detailed findings and conclusions of the District Court. Subsequently, on March 25, 1970, the District Court denied a motion by the complaining stockholders to rescind these findings and conclusions and to set the matter down for trial by jury.

The Seventh Circuit, on the ensuing appeal, affirmed in part but reversed in large part the judgment of the District Court. Reflecting the factual and legal complexities growing out of the non-jury trial, the Seventh Circuit's opinion covers 38 pages of Appendix A hereto, pp. 1a-38a, *infra.* In that lengthy ruling, however, the Seventh Circuit ignored the vast majority of the arguments and contentions advanced by the parties, arguments and contentions that dealt with the legal sufficiency of the District Court's many findings and the propriety of that court's failure to make other

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[3] In its memorandum opinion accompanying the findings and conclusions, the District Court stated: "All of the individual defendants were reputable businessmen, the integrity and veracity of whom was not questioned on this record. All defendants except two were voluntarily produced by defense counsel as witnesses for plaintiffs' direct case. The only individual defendants who did not testify were Nielsen, whom plaintiffs' counsel excused on his own motion prior to Nielsen's scheduled testimony, and Michels whose testimony was admitted by stipulation. All of the defendants who testified were examined extensively as adverse witnesses by plaintiffs' counsel, and five other former officers, employees, or counsel for Susquehanna were called by plaintiffs and testified. Defendants rested their case without calling any witnesses." Appendix B hereto, pp. 43a-44a, *infra.*

findings or to admit certain evidence.[4] Instead, the Seventh Circuit devoted itself to an extended rationalization for its ultimate conclusion that the complaining stockholders "were entitled to demand a jury trial of any legal claims historically triable to a jury which they have asserted against defendants on behalf of Susquehanna Corporation." Appendix A hereto, p. 16a, *infra*. So ruling, the court affirmed the dismissal of what it conceived to be those claims equitable in nature, and reversed and remanded for a jury trial those more extensive claims conceived to be legal in nature, i.e., primarily those issues raised in the claims for damages predicated on the merger.

At the core of the Seventh Circuit's decision is a determination that this Court's decision in *Ross* v. *Bernhard*, 396 U.S. 531 (1970), announced no new rule of constitutional law respecting the right to a jury trial in stockholders' derivative actions and "merely resolved a conflict in the circuits consistently with the Court's interpretation of prior law." Appendix A hereto, p. 14a, *infra*. Hence, said the Seventh Circuit, the *Ross* ruling respecting jury trials can properly be applied retroactively so as to compel a retrial, before a jury, of legal issues that were fully resolved by a judge in a non-jury proceeding that took place prior to this Court's decision in *Ross*. Moreover, the court could find no inequity to the defendants in such a retroactive application of the *Ross* decision since, at the time of opposing the jury trial demand, they must have

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[4] For example, only the last 7 pages of the 99-page brief submitted to the Seventh Circuit by the complaining stockholders were devoted to the jury trial issue. The bulk of the brief argued that the District Court's findings were clearly erroneous and that numerous other legal errors had been committed by the District Court.

known of the conflicting Circuit views on the jury trial issue and of the unsettled nature of that issue. Their opposition to the demand was said to be nothing more than trial tactics, there being no effort to justify any of their challenged conduct "by claiming reliance on a rule which antedated the Supreme Court decision in *Ross* v. *Bernhard.*"

REASONS FOR GRANTING THE WRIT

The Seventh Circuit has here decreed retroactive effect to this Court's decision in *Ross* v. *Bernhard*, 396 U.S. 531 (1970), which recognized a constitutional right to a jury trial as to legal issues involved in a stockholders' derivative action.

That ruling by the Seventh Circuit constitutes a highly questionable interpretation of the scope and impact of the *Ross* decision as respects its retroactivity. More importantly, the Seventh Circuit has created unwarranted confusion in the standards applicable in determining whether a new decision in the area of civil litigation should be given retroactive effect. That confusion will last far beyond the long life of the instant litigation unless this Court intervenes. And not the least of the unfortunate consequences of the ruling below is the serious burden it imposes on the federal judicial system by ordering the retrial before a jury of a most complicated case that has already received very careful and lengthy attention and resolution.

1. The Decision Below Creates an Unnecessary Burden on the Federal Judicial System by Forcing a Retrial of Complex Issues Already Fully and Competently Resolved.

At the heart of this case is the fact that neither the Seventh Circuit nor the complaining stockholders have suggested that any aspect of the non-jury trial

before Judge Marovitz of the District Court involved any impairment of the integrity or fairness of that proceeding. In that circumstance, the critical question becomes whether the values implemented by the right to a jury trial in a stockholders' derivative action, as expressed in *Ross* v. *Bernhard,* necessitate a retrial before a jury of virtually all the matters so carefully considered and resolved by Judge Marovitz.

In the context of retroactive application of new criminal law doctrines, this Court has held that retroactivity may well turn upon (a) whether "the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials," or (b) whether "the purpose of the new constitutional standard proscribing the use of certain evidence or a particular mode of trial is not to minimize or avoid arbitrary or unreliable results but to serve other ends." *Williams* v. *United States,* 401 U.S. 646, 653 (1971), opinion by White, J. Retroactive application of the new doctrine is considered appropriate in (a), but not in (b). A similar distinction would appear appropriate in cases of a civil nature, and the instant case is a convenient vehicle for this Court so to hold.

In this instance, the right to a jury trial in derivative actions would appear to serve some end other than the avoidance of unfair non-jury trials. Nothing in *Ross* v. *Bernhard* suggests that the exercise of the right to a jury trial in such actions is necessary to improve the truth-finding function of the federal court system; and that decision did not seek to render invalid any other kind of procedure that was valid when pursued.

Cf. *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U.S. 358, 364 (1932). The right to trial by jury clearly has a value unto itself; it is a privilege guaranteed by the Seventh Amendment that may be exercised at the will of the civil litigant and as an alternative to a non-jury procedure. But to recognize and enforce that privilege in any given type of civil proceeding is not to disparage the values that attach to non-jury procedures or to reflect upon the fairness or truth-finding capacity of those procedures.

In short, as was stated in *Duncan* v. *Louisiana*, 391 U.S. 145, 158 (1968), "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." And as added in *DeStefano* v. *Woods*, 392 U.S. 631, 634 (1968), "The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." Should not the same be said respecting retrials of civil matters resolved in the past by procedures not involving the Seventh Amendment right to trial by jury?

It must be assumed, therefore, that the non-jury proceedings before Judge Marovitz were fair, and that his truth-finding function was not impaired so as to bring the trustworthiness of his findings and conclusions into question. The ultimate question then becomes one of defining the purpose to be served by a retroactive application of the jury trial right established by *Ross* v. *Bernhard* and by a retrial before a jury of all the complex and numerous issues that were competently resolved by Judge Marovitz. Would a jury's determination of the issues resolved by him be

any more trustworthy? Would a jury's verdict lead to any more meaningful appellate review than can be accorded the detailed and voluminous findings and conclusions of Judge Marovitz? Can this Court be any more assured, in any ultimate review of the merits of the claims in this case, that a correct result has been reached should a jury's verdict be substituted for Judge Marovitz' findings and conclusions?

Further relevant to any decision as to the retroactive application of the jury trial right in this fully litigated case is the fact that a retrial by jury will necessarily entail great expenditures of time, energy and money by the parties, duplicating much of what they have already invested in the prolonged non-jury proceedings. Thousands of pages of testimony will have to be repeated, assuming all the relevant witnesses are still alive and available, and countless documentary exhibits will have to be introduced and explained to the jury. An already overburdened docket will be augmented by this massive civil trial proceeding, and extensive judicial and administrative energies will be expended in supervising the jury trial proceedings. And whatever the verdict of the jury, the case will go back to the Seventh Circuit for review—in the same posture that the case now rests.

One final consideration may also be relevant to the ultimate question posed by this case. Despite the technical compliance with Civil Rule 38(b), the fact remains that the complaining stockholders delayed for 38 months their request for a jury trial. Even they did not consider the immediate exercise of their privilege very vital to their cause. And in the absence of special circumstances excusing such a long delay, courts have been known to deny jury trial requests,

particularly in complicated and complex cases.[5] See *General Tire & Rubber Company* v. *Watkins,* 331 F.2d 192, 197-198 (C.A. 4, 1964), certiorari denied, 377 U.S. 952 (1964), where the circumstances militating against the grant of a dilatory jury trial motion included "the mass of depositions and documents, the technicalities involved in determining the issues of patent validity and infringement, the experience of the court in patent cases, the difficulties to be encountered in instructing a jury, and the doubtful ability of jurors with only ordinary experience to comprehend the complex issues and to reach a correct conclusion."

The totality of these circumstances may well dictate that no justifiable end would be served by a retroactive application of the jury trial right recognized by *Ross* v. *Bernhard.* On the contrary, grave injustice and hardship might befall both the parties and the courts if a retrial of this complicated claim were now had. The simple solution may lie in a direction by this Court that the Seventh Circuit vacate its order of reversal and proceed to resolve the issues already briefed concerning the sufficiency and legal correctness of the findings and conclusions of Judge Marovitz.

2. The Decision Below Creates Confusion as to the Standards for Determining the Retroactivity of New Judical Decisions in the Area of Civil Litigation.

This Court's opinion in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 105-107, (1971), forced a rather reluctant concession from the Seventh Circuit that the problem of the nonretroactive application of judicial decisions is not one confined to the area of the criminal process. The *Chevron Oil* opinion not only demonstrated that

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[5] See, in general, 9 Wright and Miller, Federal Practice and Procedure, § 2334 (1971).

the problem has long been present in the area of civil litigation but it spelled out the "three separate factors" that have generally and traditionally been considered in determining retroactivity in the civil litigation context. The Seventh Circuit purported to follow those "three separate factors" in assessing the retroactivity to be accorded *Ross* v. *Bernhard*. But in so doing, that court has added confusion to those factors and has misread the nature and importance of *Ross* v. *Bernhard* for retroactivity purposes.

A. The first factor mentioned in *Chevron Oil*, 404 U.S. at 106, and the one that the Seventh Circuit found to be decisive in this case, is that "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." Here, *Ross* v. *Bernhard* has been held not to have established any new principle of law because, in the words of the Seventh Circuit, the majority opinion in *Ross* "merely held, in agreement with a 1963 decision of the Ninth Circuit, that 'the Seventh Amendment preserves to the parties in a stockholder's suit the same right to a jury trial that historically belonged to the corporation and to those against whom the corporation pressed its legal claims.' 396 U.S. at 542. . . . It merely resolved a conflict in the circuits consistently with the Court's interpretation of prior law." Appendix A hereto, p. 14a, *infra*.

Such a characterization of the majority opinion in *Ross* v. *Bernhard* is instantly suspect. This Court's function is generally more profound and meaningful than "merely" resolving a conflict in the Circuits. And certainly the principles of law that are established by

this Court from time to time are no less new or novel because they were the subject of conflicting viewpoints among the lower courts or because this Court's assessment happens to coincide with one expressed by a lower court. New principles often develop out of confusion and conflict in the lower judiciary. *Ross* v. *Bernhard* would appear to be a classic example of this adjudicative process. This Court accepted the case for review because of the admitted conflict of viewpoint between the Second and the Ninth Circuits.[6] The majority of this Court then acknowledged that, apart from the Ninth Circuit's earlier opinion, there was no authoritative precedent in the federal system "squarely passing on the applicability of the Seventh Amendment to the trial of a legal claim presented in a pre-merger derivative suit." 396 U.S. at 536. And it was only after its own analysis of the Seventh Amendment precedents and its own interpretation of the Federal Rules of Civil Procedure that the majority enunciated the new and authoritative principle that the Seventh Amendment preserves to the parties in a stockholder's suit the right to a jury trial as to legal issues.[7]

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[6] The Ninth Circuit opinion referred to was *DePinto* v. *Provident Security Life Ins. Co.*, 323 F.2d 826 (C.A. 9, 1963). The denial of certiorari in *DePinto* (376 U.S. 950), of course, cannot be construed as approval by this Court of that decision. As Mr. Justice Stewart's dissent pointed out in *Ross*, 396 U.S. at 546, *DePinto* was "a decision that has since been followed by no court until the present case." The majority of this Court in *Ross* agreed with that assessment of *DePinto*. 396 U.S. at 537, n. 9. But it was the conflict between *DePinto* and the Second Circuit's ruling in *Ross* v. *Bernhard* that led to the grant of certiorari in *Ross*. 396 U.S. at 532.

[7] See also the complaint registered in the dissenting opinion in *Ross*, 396 U.S. at 544-545, that the majority "tosses aside history, logic, and over 100 years of firm precedent to hold that the plaintiff in a shareholder's derivative suit does indeed have a constitutional right to a trial by jury."

The Seventh Circuit's complete misconception of the decisional process in *Ross* v. *Bernhard* warrants correction by this Court. Only this Court can authoritatively construe one of its own opinions. Left unreviewed, the misconstruction adopted below can only add confusion and uncertainty to the first of the retroactivity tests mentioned in *Chevron Oil*. The decision below seems to mean that, at least in the area of civil litigation, any decision of this Court can be applied retroactively if the principle of law therein enunciated happens to coincide with that earlier expressed by some lower court. The "new principle of law" referred to in *Chevron Oil* apparently signifies, under the Seventh Circuit's interpretation, a *de novo* promulgation by this Court of a legal concept that no lower court has ever suggested or adopted.

B. The second factor mentioned in *Chevron Oil* for determining the retroactivity of a decision establishing a new principle of law concerns "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 404 U.S. at 107. In rejecting any claim of nonretroactivity based on this criterion, the Seventh Circuit in this case merely said that "we fail to see how retroactive application [of *Ross* v. *Bernhard*] will retard operation of the rule." Appendix A hereto, p. 15a, *infra*.

But this test, which originated in *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965), was meant to be applied carefully by weighing "the merits and demerits in each case" of each specified consideration. What was the "prior history" of the jury trial requirement at the time that the demand was here made? What would be the purpose or effect of retroactively

requiring a jury trial in a proceeding already fully litigated and resolved? Absent any finding that the non-jury trial was unfair or inadequate, how can a retroactive application of the jury trial requirement either further or retard the operation of that requirement? To permit the simple answer given by the Seventh Circuit to serve as an adequate response to these critical questions is to subvert the criterion here involved and to encourage easy appellate evasion of the responsibility to enforce the criterion.

C. The third and last factor specified in *Chevron Oil* involves weighing "the inequity imposed by retroactive application" of the new rule. 404 U.S. at 107. Or, as stated in *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969), where a decision of this Court "could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." The Seventh Circuit's stewardship of this criterion in this case is found in its remarks (1) that the defendants were aware of the unsettled nature of the jury trial requirement, as revealed by the Ninth Circuit decision in the *DePinto* case and dissent by one of the Second Circuit judges in the *Ross* case, and thus bore the risk of this Court's reversal in *Ross*,[8] and (2) that its appraisal of certain disclosures pertaining to an exchange of stock "persuades us that it would not be inequitable to retry this case." Appendix A hereto, p. 15a, *infra*.

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[8] The Seventh Circuit's insistence at this point in the opinion that the issue as to the constitutional right to a jury trial "was not settled" should be contrasted with its earlier statement that this Court's subsequent opinion in *Ross* "did not establish a new principle of law." Cf. pp. 14a and 15a, Appendix A hereto, *infra*.

Here again the Seventh Circuit appears to have diluted and confused a retroactivity criterion to the point of meaningless posturing. How can "injustice or hardship" be tested by reference not to the injustice that might adhere to a retroactive jury trial requirement but to the "risk" that this Court would clarify the law and establish the basic right to a jury trial? How can "injustice or hardship" be tested without the slightest consideration being given to the propriety and fairness of the non-jury trial that was had, the enormous expenditure of time, money and judicial effort involved in a retrial before a jury, or the appropriateness of applying the normal appellate review standards to the extensive findings and conclusions entered by a competent trial judge? Only this Court can now restore some meaning to the third of the *Chevron Oil* retroactivity criteria, from which the Seventh Circuit has drained so much.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 25, 1972.